

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
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Date: **August 9, 2000**

Case No.: **2000-INA-94**

CO No.: **P1999-MA-01272476**

In the Matter of:

STRATHMORE REALTY TRUST

Employer,

on behalf of:

CORNEILO BASTO

Alien.

Appearances: **Bruce Percelay
For Employer and Alien**

Certifying Officer: **Raimundo A. Lopez
Boston, Massachusetts**

Before: **Burke, Wood and Vittone
Administrative Law Judges**

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

Under section 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Service Technician. In the original application ("ETA 750A"), Employer sought certification to employ Cornelio Bastos ("Alien") to fill the position of Service Technician with the following duties:

Responsible for supervision and maintenance of 10 buildings. Should have knowledge of proper building construction in order to assure buildings are maintained to conform with safety and comfort standards. Understand needs and problems of tenants. Correct any arising problems. Keep inventory of maintenance supplies and order whatever needed as need arises. (AF 55-58)

Additionally, the job requires two years of experience. (AF 26).

Employer, Strathmore Realty and Trust, filed an application for alien labor certification on October 15, 1997 for the position of Service Technician, as previously mentioned herein. (AF 50). Employer was informed by the State agency on September 5, 1998 that the application was deficient, in that Employer was offering a wage below the prevailing wage and that Alien did not appear to meet Employer's stated experience requirement. (AF 62). Accordingly, Employer amended his application in order to meet the prevailing wage requirement and to elaborate on Alien's experience. On November 2, 1998, the State Agency sent Employer a letter concerning the requirements to be followed for recruitment of applicants for the position. (AF 51-54). The position was advertised in the Boston Herald for three consecutive days, and Employer received eight responses. (AF 25-26). Additionally, Employer posted a notice of a job listing at the place of business from November 17, 1998 until November 27, 1998 which did not result in a response. (AF 25-27).

On June 11, 1999, the CO issued a Notice of Findings ("NOF") stating the Department's intention to deny the application for alien labor certification because it appeared that the rejection of U.S. applicants was based upon reasons not job-related. (AF 9-11). The CO found that "employer, as of yet, has not made any convincing attestation that a good faith attempt at contacting U.S. workers

for the position of Service Technician occurred.” (AF 10). Employer was informed:

To receive a further review of this case [it] must provide documentation that proves a good faith effort to recruit U.S. workers, as well as to show that they were rejected for lawful, job related reasons. The employer can produce phone records, if applicable, and signed double sided certified mail receipts in order to prove they acted in a lawful, fair and timely manner with intentions to hire a qualified U.S. worker. (AF 11).

Employer submitted a letter constituting its Rebuttal to the NOF on June, 23, 1999, in which Employer addressed the reasons for not hiring any of the six applicants that were found to be qualified for the job. (AF 7-8). Employer reported that four of the candidates indicated that they were not interested in the position because no benefits were offered. Another applicant was contacted via certified mail, but failed to respond. With regard to Mr. Caiani, Employer stated that, following an initial contact in which he indicated that he would prefer a job that did not require him to move to Boston, an interview was set up for him on three separate occasions, and he failed to appear at each one.¹ Additionally, Employer stated that Mr. Crawford had indicated that he did not desire to live on site. (AF 8). The CO later found this statement to be inconsistent with other information. However, Employer’s subsequent letter explained that this was a clerical error and was an innocent oversight, not a deliberate distortion of the facts. (AF 1).

On August 26, 1999, the CO issued a Final Determination denying certification. (AF 6). The CO stated that Employer’s Rebuttal documentation was considered, but that Employer failed to rebut the findings provided in the NOF. The CO concluded that “It appears the employer has rejected U.S. applicants for other than job-related reasons.” This conclusion was premised on the inadequacies of the rebuttal information concerning Employer’s justification for not hiring one of the six applicants deemed qualified for the position. Specifically, the CO cited Employer’s failure to meet the requirements of the NOF by not providing all of the requested documentation. The CO additionally found inconsistencies pertaining to the recruitment results provided by Employer.

Employer filed a Request for Reconsideration of the denial to the CO on September 27, 1999. (AF 5). The request relied on the arguments put forth in the rebuttal. Accordingly, the CO denied the Request for Reconsideration on October 2, 1999. (AF 4). Although Employer did not specifically request that the application be forwarded to the Board, the CO stated his intent to do so in his Denial. Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. The record additionally contains two letters dated October 5, 1999. One is addressed to the Chief Judge of the Board, and the other is addressed to Senator John Kerry. (AF 1-3). The letter to Senator Kerry addresses Employer’s belief that inaccurate testimony provided to the CO served as the

¹Employer’s recruitment report indicated that applicant “Caiana” [sic] had been interviewed but did not want the position because he did not want to travel or move to Boston. (AF 28). Mr. Caiani had disputed this account. (AF 12).

basis for denial of the certification. Employer additionally expressed concern that they might not be afforded the opportunity to be heard on that matter. In closing, Employer made the following request: "All we are asking is to make sure that the appeal process allows us the opportunity to directly challenge the testimony referenced in the enclosed letter." (AF 3).

The letter to which Employer referred to was a letter addressed to the Chief Administrative Law Judge. (AF 1-2). The letter to the Board states, in part, "The purpose of this letter is to express my deepest concerns that an appeal in the application of Cornelio Bastos may be influenced by complete falsehoods or inaccuracies presented by Bernardo Caiani." The letter also references a clerical error regarding one applicant. It then states, "I am willing to testify under oath along with my property manager that Mr. Caiani did not show up for a series of interviews..... If his testimony is the source of the denial of Mr. Bastos' appeal, then a tremendous injustice will have been served. I ask that you allow this letter as additional evidence into your appeal process and invite you to call me in for personal testimony on this matter." (AF 1). Employer expressed the same concerns in his letter to Senator Kerry and requested that it be allowed to challenge the testimony at issue in course of the appeal process. (AF 3).

DISCUSSION

In the Final Determination, the CO found two major deficiencies in Employer's Rebuttal which lead him to conclude that U.S. applicants were rejected for other than job-related reasons. First, the CO noted that Employer failed to provide the requested documentation of their good faith efforts to recruit U.S. workers in the form of phone records or certified mail receipts. The CO also paid particular attention to inconsistencies in Employer's reported recruitment results regarding Mr. Crawford and Mr. Caiani.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §§ 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §§ 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants and not stop short of fully investigating an applicant's qualifications. Similarly, §§ 656.21(j)(1)(iv) requires the employer to provide the local office with a written report of all post-application recruitment, which explains "with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed."

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §§ 656.1. Furthermore, an employer must adequately document its recruitment efforts.

Mere assertions of recruitment activity are insufficient without supporting documentation. *Paterson Board of Education*, 1988-INA-88 (Apr. 21, 1988) (employer asserted, without documentation, that it recruited at colleges and universities and advertised in newspapers for a position as high school math teacher).

In addition, all findings in the NOF which are not rebutted are deemed admitted. *D.C. National Cab Co., Inc.* 1989-INA-294 (May 22, 1991) (unrebutted challenges deemed admitted where the employer ignored an opportunity to cure rebuttal's defects by submitting information for recruitment report). However, an employer will not be held to an impossible standard of proof. If a CO requests specific, relevant and reasonably obtainable documentation of an employer's recruitment efforts, the employer must produce it. *Oconee Center, Mental Retardation Services*, 1988-INA-40 (July 5, 1988) (employer failed to provide job register from its most recent recruitment effort, which CO reasonably requested to aid in determination of whether U.S. workers were available and lawfully rejected). If the employer does not possess a properly requested document, it should make reasonable efforts to obtain it. *Andersen Typographics*, 1990-INA-287 (June 20, 1991) (employer claimed that it lost or did not receive four resumes, but could have requested copies from the state job service).

In light of the contradictory reports of communications between Mr. Caiani and Employer, additional documentation would be extremely helpful. However, in the present case, we have only the two conflicting stories provided in the record. This presents the difficult and unpleasant task of attempting to decide who is telling the truth.

The lack of documentation is problematic in another context as well. In the NOF, the CO specifically provided two methods by which Employer could adequately document his good faith recruiting efforts. The Employer did offer a certified mail receipt concerning a letter sent to one applicant, Mr. Sanko. (AF 29). While the CO stated that the form of the receipt was inadequate, we find that the documentation provided, with respect to the letter sent via certified mail, satisfactory.

However, a problem arises in conjunction with the requested documentation of phone records. In Employer's Rebuttal, there was no mention made of the availability of phone records or Employer's efforts to procure the same. The CO made a reasonable request for additional documentation and listed two forms that would be acceptable. If Employer found that obtaining phone records which would document his communication to be an unreasonable request, he had ample opportunity to address this issue in both his Rebuttal and subsequent letter to the Board. Instead, after being requested for this information in the NOF and cited for the failure to provide the records in the Final Determination, Employer never once offered an explanation as to why no phone records were provided. Nor did Employer document any attempt to obtain them. This failure results in Employer's inability to meet his burden of proof and in a denial of the request for alien certification.

As previously mentioned, the CO, in the Final Determination, raised the concern that Employer

provided information that was conflicting with reports from Mr. Crawford and Mr. Caiani and information previously supplied by Employer. The concerns raised by Employer in his letter to the Board and to Senator Kerry have been duly noted, and his letter will serve as his attestation in lieu of formal testimony. Pertaining to Mr. Crawford, Employer has made a conscientious effort to explain that an innocent clerical error resulted in inaccurate information being provided to the CO. Employer also addressed the reasoning behind why one of the applicants, Mr. Bryant, had a notation made by Employer indicating he was interested in the job when Employer later reported to the CO that Mr. Bryant declined the position. However, the inconsistency relating to Mr. Caiani is not so easily resolved, as doing so pits one person's version of the truth against another's.

An employer's narrative account of its recruitment efforts may provide some indication of its own reliability: if the account is internally inconsistent or seems improbable, its truth may be suspect; on the other hand, naturally coherent details may give the account at least an appearance of truth. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). With regard to half of the qualified applicants, there has been some issue as to the reliability of Employer's recruitment efforts. This casts a long shadow when attempting to decide the veracity of the parties. As mentioned, Employer has made a conscientious effort to resolve these conflicts. However, by not fully responding to the CO's request for documentation in the NOF, Employer has failed to establish that a good faith effort to recruit U.S. workers was performed, and thus there is no need to address these conflicts. Accordingly, the following order shall issue.

ORDER

IT IS ORDERED that this request for certification is hereby **DENIED**

Entered at the direction of the panel by:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional

importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.